A

LIM GIM SEAH

v.

LOKMAN TALIB & ORS

B

COURT OF APPEAL, PUTRAJAYA
AHMAD MAAROP FCJ
ABDUL MALIK ISHAK JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: K-04-248-2008]

C

26 JANUARY 2012

TORT: *Vicarious liability - Personal injuries - Injuries sustained by appellant on 2nd defendant's worksite - 3rd defendant as main contractor contracted 2nd defendant for works at site - Sessions and High Court*

D *judges held no negligence on 3rd respondent's part - Whether 3rd respondent should be vicariously liable for negligence - Whether test to determine negligence based on 2nd respondent as an independent contractor*

TORT: *Damages - Personal injuries - Appellant injured himself at 2nd*

E *defendant's worksite - 3rd defendant as main contractor contracted 2nd defendant for works at site - 3rd respondent held to be not negligent - Whether 3rd respondent should be vicariously liable for negligence - Whether test to determine negligence based on 2nd respondent as an independent contractor*

F Time Telecommunications Sdn Bhd had awarded a contract to undertake the construction of manholes, laying of ducts and other related works ('the project') to the 3rd respondent. The 3rd respondent then had awarded part of the project ('the contract') involving the installation of fibre optic cables to the 2nd

G respondent including the works along Jalan Kanchut in Alor Setar, Kedah ('the site'). On 13 June 1995, the appellant had fallen into a hole at the site and injured himself when he was riding his motorcycle along Jalan Kanchut. The learned Sessions Court Judge held the 1st and 2nd respondents to be 70% negligent and

H the appellant to be 30% contributory negligent for the accident and did not find any negligence on the part of the 3rd respondent. The appellant's appeal to the High Court against the decision was dismissed and therefore, this action. It was argued by the appellant's counsel that the learned judges of the Sessions

I and High Court had erred when relying only on cls. 16 and 18 of

the contract in determining who was in control of the site when in fact, upon reading of cls. 2.1, 2.2, 2.3, 2.5, 4.4, 13 and 15.2, it should have been evident that the 2nd respondent was at the material time undertaking work in accordance with the instructions of the Superintending Officer ('S.O.') and to the extent that the S.O. was an employee of the 3rd respondent under the terms of the contract, the 3rd respondent could be said to be in control of the site at the material time. Counsel for the respondent submitted that the test to determine whether the 3rd defendant was vicariously liable for the acts/omission of the 2nd respondent depended entirely on whether the 2nd respondent was an independent contractor, based on the test set out in *Honeywill and Stein, Limited v. Larkin Brothers (London's Commercial Photographers Limited)* ('the test'). The two issues that arose were (i) whether the 2nd respondent's 70% negligence should be equally borne by the 3rd respondent; and (ii) whether the 3rd respondent is strictly liable for the negligence of the 2nd respondent based on the test under the principles of law.

Held (dismissing appeal with costs)
Per Anantham Kasinather JCA delivering the judgment of the court:

(1) Based on the evidence before the court, the 1st respondent was the employee of the 2nd and not of the 3rd respondent. Furthermore, this court agreed with the learned Sessions Judge that from a plain reading of cl. 16 of the contract, the site was deemed to be in the control of the 2nd respondent until the issuance of the taking over order by the S.O. based on cl. 35 in the contract between the 2nd and 3rd respondents. (para 13)

(2) It was necessary for the S.O. who was appointed by the 3rd respondent to give instructions to the 2nd respondent since the works undertaken by the 2nd respondent were complementary to the works undertaken by the 3rd respondent as part of the project. Accordingly, the S.O.'s instructions were not intended to control the actual performance of the 2nd respondent as much as to ensure that the works of the 2nd respondent were in conformity with the project. *(Salsbury v. Woodland and Others* and *Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor)* (paras 14-16)

(3) The facts of the instant appeal did not fall within the exception to the general rule, *ie*, either the first or second class of cases cited in *Salsbury v. Woodland and Others.* In that case first class referred to "extra-hazardous acts" and the second class concerned the dangers created on highways. Even if this was wrong, the appeal must still fail since it was neither the appellant's pleaded case nor was there any evidence that the nature of the work undertaken by the 3rd respondent resulted in the creation of a direct duty of care to the appellant on the 3rd respondent. (paras 17-19)

Bahasa Malaysia *Translation Of Headnotes*

Time Telecommunications Sdn Bhd telah mengawadkan satu kontrak untuk menjalankan pembinaan lurang pembetungan, pemasangan saluran dan kerja-kerja lain yang berkaitan ('projek tersebut') kepada responden ketiga. Responden ketiga kemudiannya telah mengawadkan sebahagian projek tersebut ('kontrak tersebut') kepada responden kedua yang melibatkan pemasangan kabel gentian optik termasuk kerja-kerja di sepanjang Jalan Kanchut di Alor Setar, Kedah ('tapak tersebut'). Pada 13 Jun 1995, perayu telah terjatuh ke dalam lubang di tapak tersebut dan telah mengalami kecederaan apabila beliau sedang menunggang motosikalnya di Jalan Kanchut. Yang Arif Hakim Mahkamah Sesyen telah memutuskan bahawa responden pertama dan kedua adalah 70% cuai dan perayu adalah 30% menyumbang kecuaian atas kemalangan itu dan memutuskan bahawa responden ketiga tidak melakukan apa-apa kecuaian. Rayuan perayu ke Mahkamah Tinggi terhadap keputusan tersebut ditolak dan maka, tindakan ini. Ia dihujahkan oleh peguam perayu bahawa Yang Arif Hakim-hakim Mahkamah Sesyen dan Mahkamah Tinggi telah khilaf apabila bergantung hanya pada kl. 16 dan 18 kontrak tersebut bagi menentukan siapakah yang mempunyai kawalan ke atas tapak tersebut sedangkan pada hakikatnya, dengan pembacaan kl. 2.1, 2.2, 2.3, 2.5, 4.4, 13 dan 5.2, ia sepatutnya jelas bahawa responden kedua pada masa material sedang melakukan kerja-kerja mengikut arahan dari Pegawai Penguasa ('S.O.') dan oleh kerana S.O. merupakan pekerja responden ketiga menurut terma-terma kontrak tersebut, responden ketiga boleh dikatakan mempunyai kawalan ke atas tapak tersebut pada masa material. Peguam bagi responden telah menghujahkan bahawa ujian bagi menentukan

sama ada responden ketiga adalah bertanggungan secara vikarius ke atas perbuatan atau peninggalan responden kedua bergantung sepenuhnya sama ada responden kedua adalah kontraktor bebas, berdasarkan ujian yang dinyatakan di dalam kes *Honeywill and Stein, Limited v. Larkin Brothers (London's Commercial Photographers Limited)* ('ujian tersebut'). Dua isu yang berbangkit adalah (i) sama ada 70% kecuaian responden kedua sepatutnya ditanggung bersama oleh responden ketiga; dan (ii) sama ada responden ketiga adalah benar-benar bertanggungjawab atas kecuaian responden kedua berdasarkan ujian di bawah prinsip undang-undang.

Diputuskan (menolak rayuan dengan kos)
Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan keterangan di hadapan mahkamah, responden pertama adalah pekerja responden kedua dan bukan responden ketiga. Tambahan, mahkamah ini bersetuju dengan Yang Arif Hakim Mahkamah Sesyen bahawa dengan pembacaan biasa kl. 16 kontrak itu, tapak tersebut dianggap di bawah kawalan responden kedua sehinggalah pengeluaran perintah untuk mengambil alih oleh S.O berdasarkan kl. 35 kontrak di antara responden kedua dan ketiga.

(2) Ianya adalah perlu bagi S.O yang telah dilantik oleh responden ketiga untuk memberi arahan kepada responden kedua memandangkan kerja-kerja yang dijalankan oleh responden kedua saling melengkapi kerja-kerja responden ketiga yang merupakan sebahagian daripada projek tersebut. Sewajarnya, arahan-arahan S.O. adalah tidak bermaksud untuk mengawal prestasi kerja responden kedua sebagaimana untuk memastikan kerja-kerja responden kedua adalah selaras dengan projek tersebut. *(Salsbury v. Woodland and Others* dan *Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor)*

(3) Fakta di dalam rayuan ini tidak terangkum dalam pengecualian kepada kaedah am, iaitu, kes-kes kelas pertama atau kedua yang dinyatakan di dalam *Salsbury v. Woodland and Others.* Dalam kes itu kelas pertama merujuk kepada "extra-hazardous act" dan kelas kedua berkaitan dengan bahaya yang wujud di lebuhraya. Jika ia salah sekalipun, rayuan ini masih gagal

A kerana perayu tidak memplid dan tidak ada keterangan bahawa sifat kerja yang dilakukan oleh responden ketiga mengakibatkan kewujudan kewajipan berjaga-jaga secara langsung terhadap perayu kepada responden ketiga.

B **Case(s) referred to:**

Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor [1993] 3 CLJ 205 FC ***(refd)***

Holliday v. National Telephone Company [1899] 2 QB 392 ***(dist)***

Honeywill and Stein, Limited v. Larkin Brothers (London's Commercial Photographers Limited [1934] 1 KB 191 ***(dist)***

C *Salsbury v. Woodland And Others [1970] 1 QB 324* ***(dist)***

Walsh v. Holst & Co Ltd And Others [1958] 1 WLR 800 ***(refd)***

For the appellant - Brijnandan Singh Bhar; M/s Brijnandan Singh Bhar & Co

For the respondent - K Sivabalan; M/s Shahrizat Rashid & Lee

D

[Appeal from High Court, Alor Setar; Civil Appeal No: 12-21-2005]

Reported by Baizura Abd Razak

E

JUDGMENT

Anantham Kasinather JCA:

Background Facts

F

[1] From the evidence before the court, it appears that Time Telecommunications Sdn Bhd awarded a contract to undertake the construction of manholes, laying of ducts and other related works to the 3rd respondent ('the project'). The 3rd respondent G awarded that part of the project involving the installation of fibre optic cables below the highway to the 2nd respondent ('the works'). The works undertaken by the 2nd respondent included undertaking the works along Jalan Kanchut in Alor Setar (the site). The terms of the contract between the 2nd and 3rd respondents H can be found from pp. 5 to 354 of the 3rd respondent's core bundle of documents vol. 1.

[2] According to the unchallenged evidence of Encik Ghazali bin Mohamad Noor (SP3), JKR is responsible for the maintainance of I the site. It is his evidence that a permit had been granted to Time Telecommunications Sdn Bhd to undertake the said project

commencing July 1995 (see p. 472 of the 3rd respondent's core bundle vol. 2). It is therefore reasonable to conclude that the owner of the site is JKR, the employer of the project is Time Telecommunications Sdn Bhd, the 3rd respondent is the contractor and the 2nd respondent the sub-contractor in respect of the works being conducted at the site.

[3] On 13 June 1995 at about 2.30am, the plaintiff (appellant) was riding motorcycle No. KT 2268 along Jalan Kanchut in Alor Setar and in the direction of Anak Bukit in Alor Setar when he fell into a hole in the site and as a result of which he was injured. According to the investigating officer, the workers at the site when he visited the site shortly after the accident were employees of the 2nd respondent and he interviewed the 1st respondent in his capacity as the supervisor of the 2nd respondent (see the evidence of SP2 at p. 465 of core bundle). It is the appellant's pleaded case that the 1st respondent was the servant/agent of either the 2nd or 3rd respondent when acting as the supervisor of the project. Hence, the inclusion of the 3rd respondent as a defendant in this suit. However, it is not in dispute that the Superintending Officer ('S.O') under the contract between the 2nd and 3rd respondents was one Encik Shamsul Anuar bin Mohd Don (SD1) an employee of the 3rd respondent.

[4] On the conclusion of the trial the learned Sessions Court Judge held the 1st and 2nd respondents to be 70% negligent and the appellant to be 30% contributory negligent for the accident. The learned Sessions Court Judge did not find any negligence on the part of the 3rd respondent. The appeal by the appellant against the whole of the said decision of the learned Sessions Court Judge was dismissed by the High Court on 24 January 2008.

Issues

[5] The two issues raised in this appeal are first, whether the 2nd respondent's 70% negligence should be equally borne by the 3rd respondent. Secondly, whether the 3rd respondent is strictly liable for the negligence of the 2nd respondent under the principles of law pronounced by the English Court of Appeal in the case of *Holliday v. National Telephone Company* [1899] 2 QB 392.

[6] On the first issue, counsel for the appellant submitted that, in law, liability for negligence for works undertaken in the highway is imputed to the person 'in control' of the work site and not determined by any categorization of whether that person is a contractor or sub-contractor. Counsel for the appellant then contended that to the extent the 3rd respondent was 'in control' of the site, the learned Sessions Court Judge ought to have made a finding that the 3rd respondent was contributory negligent together with the 2nd respondent (see the submission of counsel for the appellant before the High Court at p. 3 of vol. 11). The basis for counsel's submission was that the learned judges of the Sessions and High Court had erroneously relied on cls. 16 and 18 of the contract in determining who was in control of the site, when, according to counsel the relevant clauses were cls. 2.1, 2.2, 2.3, 2.5, 4.4, 13 and 15.2. Learned counsel for the respondent on the other hand contended that apart from cls. 16 and 18, the Lower Courts decision can also be justified by reference to cls. 30.1, 30.5 and 35.1.

[7] The relevant clauses read as follows:

Clause 2.1

Duties and Powers of S.O

The S.O shall be the representative and agent of the Contractor in carrying out any and all of his duties (including without limitation thereto the issue of any certificate) under the contract and shall act solely on behalf of the Contractor, and shall not have any independent role whatsoever.

Clause 2.2

The S.O's duties are to watch and supervise the works, to test and examine any materials to be used, for workmanship employed in connection with the works, to issue instructions to the sub-contractor and to be the on-site representative of the contractor.

Clause 2.3

The S.O may appoint any number of persons to assist the S.O in the exercise of his functions. The names and functions of such persons shall be notified to the sub-contractor. The said

assistants shall have no power to issue any instructions to the sub-contractor save insofar as such instructions may be necessary to enable them to discharge their functions in accordance with this contract. Any instructions given by any such assistants shall be deemed to have been given by the S.O.

Clause 2.5

If the Sub-Contractor shall be dissatisfied by reason of any act of any assistant of the S.O or other person duly authorized by the S.O under sub-clause 2.4 above, he shall be entitled to refer the matter to the S.O for his decision.

Clause 4.4

The sub-contractor shall provide sufficient superintendence whether on the site or elsewhere to ensure that the work to be carried out by a sub-contractor or supplier will comply with the requirements of the contract. The S.O may, by written notification order that the sub-contractor terminate the sub-contract or supply contract as the case may be, of any sub-contractor or supplier and the sub-contractor shall, at his own expense, within 21 days after the receipt of such notification so terminate such sub-contract or supply contract.

Clause 13

Work to the satisfaction of S.O

Work to be to the satisfaction of the S.O.

Save insofar as it is legally possible the sub-contractor shall execute the works in strict accordance with the contract to the satisfaction of the S.O and shall comply with (but without any prejudice to the sub-contractor's obligations hereunder) and adhere strictly to the S.O's instructions and directions on any matter (whether mentioned in the contract or not).

Clause 15.2

The S.O shall be at liberty to object to and require the sub-contractor to remove forthwith from the works at the sub-contractor's expense any person employed by the sub-contractor or his sub-contractors in or about the execution of

the works and such person shall not be employed again upon the works without the written permission of the S.O. The S.O shall not be required to justify his reasons for requiring a person to be removed from the works. Any person so removed from the works shall be replaced at the sub-contractor's expense as soon as possible by a competent substitute approved by the S.O.

Clause 16.1

Care of Works

From the commencement of the works until the date stated in the Taking Over Certificate for the whole of the works issued pursuant to cl. 35 (Taking Over), the sub-contractor shall take full responsibility for the care thereof. Provided that if the S.O shall issue a Taking Over Certificate in respect of any section, the sub-contractor shall cease to be liable for the care of that section from the date stated in the Taking Over Certificate in respect of that section and the responsibility for the care of that section shall pass to the contractor. Provided further that the sub-contractor shall take full responsibility for the care of any outstanding work which he shall have undertaken to carry out during the defects liability period after taking over until such outstanding work is completed.

Clause 16.2

In case any damage, loss or injury shall happen to the works or to any part thereof from any cause whatsoever (save and except the excepted risk) including any negligence or default of the contractor his servants or agents while the sub-contractor shall be responsible for the care thereof, the sub-contractor shall at his own expense repair and make good the same so that at completion the works shall be in good order and condition and in conformity in every respect with the requirements of the contract and the S.O's instructions. In the event of any such damage, loss or injury happening from any of the Excepted Risks, the sub-contractor shall, if and to the extent required by the S.O. repair and make good the same as aforesaid and the additional Costs of so doing shall be added to the contract sum subject to and in accordance with cl. 47 (claims). The sub-contractor shall also be liable for any

damage to the works occasioned by him in the course of any operations carried out by him for the purpose of completing any outstanding work or complying with his obligations under cl. 31 (defects liability period).

Clause 18.1

Indemnity For Negligent Acts And For Personal Injury

The sub-contractor shall be liable for and shall indemnify the employer and the contractor against any expense, liability, loss, claim or proceedings whatsoever arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of, in the course of or caused by the carrying out of the works, unless and to the extent that the same is due to any act or neglect of the contractor.

Clause 18.2

The sub-contractor shall be liable for, and shall indemnify the employer and the contractor against, any expense, liability, loss, claim or proceedings in respect of any injury or damage whatsoever to any property real or personal insofar as such injury or damage arises out of or in the course of or by reason of the carrying out of the works and provided always and to the extent that the same is due to any negligence, omission, default or act of the sub-contractor his servants or agents.

Clause 30.1

Tests On Completion

The sub-contractor shall give to the S.O in writing 28 days prior notice of the date upon which he will be ready to make the tests on completion. Unless otherwise agreed, the tests shall take place within 28 days after the said date on such day or days as the S.O shall in writing notify the sub-contractor.

Clause 30.5

If the works or any section shall fail to pass the tests, such tests shall if required by S.O or by the sub-contractor be repeated within a reasonable time upon the same terms and

A conditions save that any expense to which the S.O may be put by the repetition of the tests shall be ascertained by the contractor and deducted from the contract sum.

Clause 35.1

B **Taking Over**

As soon as the whole of the works or any section have been completed in accordance with the contract (except in minor respects that do not affect their use for the purpose for which C they are intended and save for the obligations of the sub-contractor under cl. 31 (defects liability period) and have passed the tests on completion, the S.O shall issue a taking over certificate in which he shall certify the date on which the works or any section as the case may be have been so D completed and have passed the tests on completion and the contractor shall be deemed to have taken over the works or any section on the date so certified but the issue of a taking over certificate shall not operate as an admission that the works or any section have been completed in every respect.

E

[8] According to counsel for the appellant it is evident from a reading of cls. 2.1, 2.2, 2.3, 2.5, 4.4, 13 and 15.2 that the 2nd respondent was at the material time undertaking work in accordance with the instructions of the S.O and to the extent that F the S.O was an employee of the 3rd respondent under the terms of the contract, the 3rd respondent can be said to be in control of the site at the material time.

[9] Learned counsel for the respondent, on the other hand, G submitted that the test to determine whether the 3rd defendant was vicariously liable for the acts/omission of the 2nd respondent depended entirely on whether the 2nd respondent was an independent contractor. According to him, this test is the one set out by Lord Slesser LJ in the case of *Honeywill and Stein, Limited v. Larkin Brothers (London's Commercial Photographers Limited* [1934], H 1 KB 191. His Lordship summarised the test in this manner:

> The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines I what is to be done, but retains the control of the actual

> performance, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor.

(See p. 196 of the report)

[10] Counsel for the respondent also submitted that it is evident from cls. 16, 30.1, 30.5 and 35.1 that the 2nd respondent was in full control of the site and the works during the period of the contract as the contract involved the specialised task of installing fibre optic cables below the highway. Furthermore, the 3rd respondent could only recover possession of the site upon the issuance of a certificate by the S.O and which certificate could only be issued after the successful completion of various tests to be conducted by the S.O. In other words, according to counsel for the respondent, on the facts of this case, the 3rd respondent only prescribed the work to be undertaken whilst leaving the manner of doing it entirely in the hands of the 2nd respondent so as to render the 2nd respondent to be an independent contractor, applying the test propounded by Justice Slesser. This, according to counsel for the respondent, explains why the only persons at the site at the time of the accident were the employees of the 2nd respondent and its supervisor, the 1st respondent (see the evidence of SP2 at p. 465 of the core bundle).

[11] As regards the second issue, it was the submission of counsel for the appellant that the main contractor may be liable in negligence even though work was being undertaken by an independent contractor at the time of the accident. For this proposition, counsel for the appellant invited us to have regard to the following passages in the judgments of Earl of Halsbury LC and AL Smith LJ in the case of *Holliday v. National Telephone Company*. Earl of Halsbury LC opined to this effect:

> There was clearly evidence to the effect that work, in the course of which the accident happened, was being done, not by the person whom the Defendants call an independent contractor alone, but by that person and the Defendants jointly; and I think the evidence justified the view that they were both engaged in the joint operation under such circumstances that both of them would be responsible if there were negligence in the performance of it such as that which occasioned the accident in this case. There is a further ground for holding that the Plaintiff is entitled to

succeed. There was here an interference with a public highway, which would have been unlawful but for the fact that it was authorized by the proper authority. The telephone company so authorized to interfere with a public highway are, in my opinion, bound, whether they do the work themselves or by a contractor, to take care that the public lawfully using the highway are protected against any act of negligence by a person acting for them in the execution of the works.

If the lamp were in good order, the operation would be harmless; but, if the safety-valve of the lamp were out of order, an explosion must ensue. Therefore, works were being executed in proximity to a highway, in which in the ordinary course of things an explosion might take place. It appears to me that the telephone company, by whose authority alone these works were done, were, whether the works were done by the company's servants or by a contractor, under an obligation to the public to take care that persons passing along the highway were not injured by the negligent performance of the work. For these reasons, the appeal must be allowed.

(See pp. 398 to 399 of the report)

AL Smith LJ on his part opined:

The Defendants were a telephone company who were engaged in the execution on a highway of works which were clearly dangerous. It obviously involves a certain amount of danger to have a caldron of molten lead on a highway. The Defendants, therefore, on the hypothesis that Highmore was an independent contractor, were delegating to him the execution of dangerous work upon a highway. The deputy judge finds that in making the joints between the pipes it was a proper thing for the purpose of getting the necessary flare to dip the benzoline lamp into the molten metal. The safety-valve of the lamp being out of order, the result of doing that was that the lamp exploded, and the molten lead was scattered about, some falling on the Plaintiff who was passing by upon the highway. The defence is that the Defendants are not liable in respect of the injury sustained by the Plaintiff, because it was occasioned by the negligence of an independent contractor for whom they are not responsible. In my opinion, since the decision of the House of Lords in *Hughes v. Percival* 8 App. Cas. 443 and that of the Privy Council in *Black v. Christchurch Finance Co.* [1894] AC 48, it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an

> independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway. I do not agree that this was a case of mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Highmore was engaged to perform.

(see pp. 399 to 400 of the report)

[12] Based on the aforesaid pronouncements, counsel for the appellant contended that where the independent contractor was undertaking work in the highway, the main contractor such as the 3rd respondent is liable in negligence even if the 2nd respondent was an independent contractor. According to counsel for the appellant, in such cases, the law extends the duty of care to include the main contractor since the duty imposed by law on the 3rd respondent cannot be delegated to the 2nd respondent. The rationale being that you cannot avoid liability merely by delegating the work to a third party. We were then referred to the following passage in the judgment of Sellers LJ:

> As the Electricity Board had authorized work to be done adjoining the highway which might without due precautions cause injury to anyone on the highway, the authorities already cited by my Lords show that the board would be liable for the negligence of the contractors or sub-contractors in failing to take due precautions. Likewise, the contractors would be liable for any negligence in the performance of their duties delegated to sub-contractors.

in the case of *Walsh v. Holst & Co Ltd And Others* [1958] 1 WLR 800 at p. 812 in support of this proposition.

Judgment Of The Court

First Issue

[13] In our judgment, the learned Sessions and High Court Judges cannot be faulted for determining the case based on cls. 16 and 18 and without due regard to the remaining clauses in the contract between the 2nd and 3rd respondents. We opine to this effect because the appellant's pleaded case for contending that the 3rd respondent was equally liable as the 2nd respondent was premised on one fact only. This was that the 1st respondent was the employee and/or agent of the 2nd and/or 3rd respondent

(see paras. 5 and 6 of the appellant's amended statement of claim at p. 32 of vol. 111(a)). In other words, in our judgment, the appellant having relied on this fact alone to impose vicarious liability on the 3rd respondent cannot be heard to complain since the evidence before the court was that the 1st respondent was the employee of the 2nd and not the 3rd respondent. Furthermore, we agree with the learned Sessions Judge that it is evident from a plain reading of cl. 16 of the contract that the site is deemed to be in the control of the 2nd respondent until the issuance of the taking over order by the S.O pursuant to cl. 35 of the contract between the 2nd and 3rd respondents. In our opinion, this serves to explain why the 2nd respondent is obliged to indemnify the 3rd respondent for any damage to persons or property caused whilst carrying out the works, pursuant to cl. 18. Accordingly, on this ground alone, the High Court was right to dismiss the appeal from the decision of the learned Sessions Judge.

[14] Be that as it may, since the two issues in this case were argued at length and the subject matter of lengthy submissions in writing, we propose to deal with these issues in this judgment. In our judgment, the decision of the High Court to dismiss the claim of the appellants against the 3rd respondent on the 1st issue can also be justified on the following additional grounds. First, we do not agree with counsel for the appellant that the test to determine whether a wrongdoer is a servant or agent or independent contractor varies depending on whether the works are being undertaken in the highway or elsewhere. In our judgment, the test is the same as is evident from this passage in the leading judgment of Lord Justice Widgery in the case of *Salsbury v. Woodland And Others* [1970] 1 QB 324 at pp. 336 to 337:

> It is trite law that an employer who employs an independent contractor is not vicariously responsible for the negligence of that contractor. He is not able to control the way in which the independent contractor does the work, and the vicarious obligation of a master for the negligence of his servant does not arise under the relationship of employer and independent contractor. I think that it is entirely accepted that those cases – and there are some – in which an employer has been held liable for injury done by the negligence of an independent contractor are in truth cases where the employer owes a direct duty to the person injured, a duty which he cannot delegate to the contractor on his behalf. The whole question here is whether the occupier is to be judged by the general rule, which would result in no liability, or whether he

> comes within one of the somewhat special exceptions – cases in which a direct duty to see that care is taken rests upon the employer throughout the operation. This is clear from authority; and for convenience I take from *Salmond on Torts,* 14th ed. (1965), p. 687, this statement of principle:
>
> One thing can, however, be said with confidence: the mere fact that the work entrusted to the contractor is of a character which may cause damage to others unless precautions are taken is not sufficient to impose liability on the employer. There are few operations entrusted to an agent which are not capable, if due precautions are not observed, of being sources of danger and mischief to others; and if the principal was responsible for this reason alone, the distinction between servants and independent contractors would be practically eliminated from the law.

[15] For the reasons given earlier in this judgment, in our judgment, the appellant does not fall within the general rule for imposing vicarious liability on the main contractor such as the 3rd respondent. In this respect, we adopt the rejection by LJ Widgery of the pronouncements of LJ Sellers set out in para. 12 of this judgment. LJ Widgery in *Salsbury v. Woodland And Others (supra)* at p. 340 had this to say on the pronouncements of LJ Sellers:

> But in my judgment, having considered this matter with such care as I can, I can find nothing in the authorities to which Sellers LJ referred which justifies a conclusion in the terms which he uses; and, as I have already said, this decision was *obiter* because the case turned on the absence of negligence and not upon any nice question of which of the Defendant might have been liable if negligence had been proved.

Accordingly, the appeal fails on this ground as well. Thirdly, in our judgment, the fact that the S.O appointed by the 3rd respondent was entitled to give instructions to the 2nd respondent can be easily explained away as being necessary since the works undertaken by the 2nd respondent are complementary to the works undertaken by the 3rd respondent as part of the project. This is evident from the contents of cl. 16.2 which *inter alia* requires the 2nd respondent to ensure that:

> the works shall be in good order and condition and in conformity in every respect with the requirements of the contract.

Accordingly, the S.O's instructions are not intended to control the actual performance of the 2nd respondent as much as to ensure that the works of the 2nd respondent are in conformity with the project.

Second Issue

[16] In our judgment, the answer to the second issue revolves around whether the appellant can bring his case within any of those cases which fall within the exception to the general rule. The Federal Court in the case of *Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor* (Peh Swee Chin SCJ) [1993] 3 CLJ 205 acknowledged the two exceptions to the general rule to be those cited by the English Court of Appeal in *Salsbury v. Woodland And Others (supra)*. Lord Justice Widgery in this case cited the two exceptions to be:

> The first class concerns what have sometimes been described as 'extra-hazardous acts' – acts commissioned by an employer which are so hazardous in their character that the law has thought it proper to impose this direct obligation on the employer to see that care is taken. An example of such a case is *Honeywill & Stein Ltd. v. Larkin Bros (London's Commercial Photographers) Ltd.* [1934] 1 KB 191. Other cases which one finds in the books are cases where the activity commissioned by the employer is the keeping of dangerous things within the rule is *Rylands v. Fletcher* [1868] LR 3 HL 330 and where liability is not dependent on negligence at all.
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> The second class of case, which is relevant for consideration, concerns dangers created in a highway. There are a number of cases on this branch of the law, a good example of which is *Holliday v. National Telephone Co.* [1899] 2 QB 392. These, on analysis, will all be found to be cases where work was being done in a highway and was work of a character which would have been a nuisance unless authorized by statute. It will be found in all these cases that the statutory powers under which the employer commissioned the work were statutory powers which left upon the employer a duty to see that due care was taken in the carrying out of the work, for the protection of those who passed on the highway. In accordance with principle, an employer subject to such a direct and personal duty cannot excuse himself, if things go wrong, merely because the direct cause of the injury was the act of the independent contractor.

(see p. 338 of the report)

[17] As is apparent from the contents of para. 11 of this judgment, it was contended with much force by counsel for the appellant that the facts in the instant appeal fall within the facts of the case of *Holliday v. National Telephone Company (supra)*. To the extent that Lord Justice Widgery acknowledged the judgment of the court in *Holliday v. National Telephone Company (supra)* as falling within the second class of cases, counsel for the appellant contended that it follows that the facts in the instant appeal fall within the exception to the general rule. With respect, we are unable to agree with the submission of counsel for the appellant. First, the facts in the case of *Holliday v. National Telephone Company* are materially different from the facts in the instant appeal. As acknowledged by Lord Halsbury LC, the facts in *Holliday v. National Telephone Company (supra)* involved work being undertaken not just by the independent contractor alone but jointly by the independent contractor and the employer. This is evident from His Lordship's observation at p. 398 of the reported judgment of the court that:

> I think the evidence justified the view that they were both engaged in the joint operation under such circumstances that both of them would be responsible if there were negligence in the performance of it such as that which occasion the accident in this case.

[18] Secondly, in *Holliday v. National Telephone Company (supra)*, the work undertaken in the highway also included extra hazardous acts of the nature falling within the first class of cases cited by Lord Widgery in *Salsbury v. Woodland And Others (supra)*. This is evident from His Lordship's observation at p. 399 of the reported judgment of the court that:

> In this case the work to be done was the soldering together of pipes, and for that operation it appears to have been necessary to have molten metal at hand for the purpose of being instantly applied, and it was, as the deputy judge finds, a common and proper practice, with which it may be assumed that the Defendants were familiar as they themselves did part of the work, to dip a benzoline lamp into the caldron of molten metal for the purpose of getting a flare. If the lamp were in good order, the operation would be harmless; but, if the safety-valve of the lamp were out of order, an explosion must ensue. Therefore, works were being executed in proximity to a highway, in which in the ordinary course of things an explosion might take place.

[19] In our judgment, the facts in the instant appeal do not fall within either the first or second class of cases cited in the judgment of the court in *Salsbury v. Woodland And Others (supra)*. Even if we are wrong, in our opinion, this appeal must still fail since it is neither the appellant's pleaded case nor is there any evidence that the nature of the work undertaken by the 3rd respondent resulted in the creation of a direct duty of care to the appellant on the 3rd respondent. Accordingly, this appeal fails on the second issue as well.

[20] We dismiss the appeal and order the appellant to pay costs of RM15,000 to the 3rd respondent only. We order the deposit to be paid to the 3rd respondent on account of the fixed costs.